position of a monitor to man, to walk in the right ways of the Lord, and it should not exalt itself to the position of a revelator of the divine will. When it attempts to do this, it displaces that revealed will, and usually becomes the revelator of the self-will and perversity of man.

In the Supreme Court of New York.

THE ONEIDA BANK *vs.* BURTON D. HURLBUT.

1. A holder of a bill of exchange payable at a day certain, may present it for acceptance at any time before maturity, and upon refusal of the drawee to accept, may give notice of such refusal to the prior parties, and have an action against them at once.
2. If the holder omit to give notice to the drawer and endorsors, of the refusal of the drawee to accept upon presentment, they will be discharged, unless the bill subsequently come to the hands of a bona fide holder for value, who again presents the bill and duly charges the prior parties.
3. To constitute a valid undertaking as an acceptance, the undertaking must in New York, be in writing, and signed by the acceptor. The writing must indicate that the party sought to be charged as acceptor, intended to take upon himself the obligations, and assume the liabilities of an acceptor.
4. A bill drawn by a manufacturing corporation in the country, upon an individual in New York city, who is the treasurer and financial agent of the company, and presented for acceptance to the drawee, who writes across the face of the bill, "accepted, payable at American Exchange Bank," and signs it "Clayville Mills, by E. C. Hamilton, Treasurer," (Clayville Mills being the drawers,) is not accepted by the drawee.
5. The acceptance is that of the corporation and the indorsers, are entitled to notice of non-acceptance by the drawee, and for want of notice, are discharged from liability to the holder of the bill.

This cause was tried at the Oneida Circuit, without a jury. The facts sufficiently appear in the following opinion:

C. A. Mann, for Plaintiff.

H. Denio, for Defendant.

W. F. ALLEN, Justice.—This action is brought against the de-

fendant as indorser of an inland bill of exchange drawn by the "Clayville Mill," an incorporated company doing business in Oneida county, upon "E. C. Hamilton, New York," at fifty days after date, for five thousand dollars, and indorsed by F. Hollister, the payee, by T. P. Ballou and by the defendant. Before its maturity, the bill was presented by the holder to the drawee, for acceptance, who wrote across its face, "accepted, payable at American Exchange Bank," and signed it "Clayville Mills, by E. C. Hamilton, Treasurer." The holders treated this as an acceptance by the drawee, and gave no notice of non-acceptance to the other parties to the bill. Evidence was given that the drawee was the Treasurer of the "Clayville Mills," and that the bill was drawn on account of the company, that he had no funds in hand belonging to that corporation—that he was not indebted to it—that he was the general financial agent of the company in New York, and the evidence justifies the conclusion that he was authorized to bind the company in any legitimate way, for the payment of the debt represented by the bill. Although the holder of a bill of exchange payable at a day certain, is not bound to present the same to the drawee for acceptance, before its maturity, still he may do so, and upon the refusal of the drawee to accept, cause notice of such refusal to be given to the drawer and indorsers, and have an action against them at once. If the holder omits to give notice of the refusal to accept, the drawer and indorsers will be discharged. *Blesard* vs. *Hirst*, 5 Burr. Rep., 2670; *Goodall* vs. *Dolley*, 1 T. R., 712; *Allen* vs. *Suydam*, 20 Wend. R., 324. *Roscoe* vs. *Hardy*, 12 East., 434; Story on Bills, §§ 228 and 284.

To effect such discharge, the bill must be actually presented for acceptance, and the acceptance refused. It is not sufficient that the holder informs the drawee that he has the bill, and the drawee thereupon tells him that the bill will not be accepted or paid. *Fall River Union Bank* vs. *Willard*, 5 Met., 216. Neither will presentment and refusal without notice, discharge the drawer and indorsers from liability upon the bill in the hands of a subsequent bona fide indorsee for value, who causes the same to be again presented for acceptance, and proper notice of non-acceptance to be

given. *O'Keefe* vs. *Dana*, 6 Taunt. 305; S. C. in error, 5 M. & S., 282. In the case before me, the plaintiffs were the holders of the bill at the time it was presented, and no question is made that it was actually presented for acceptance before maturity—that it was not accepted in any other manner than above stated, and that no notice of non-acceptance was given to the defendant. The only question, therefore, is whether the bill was in truth accepted by the drawee, for if not, the defendant is discharged. The plaintiffs treated the undertaking on the face of the bill, as an acceptance by the drawee, and so aver it to be in their complaint. The question is not, it appears to me, necessarily whether the Clayville Mills are bound by the acceptance. It is quite immaterial whether an obligation has been incurred by a third person. If none was incurred by the drawee, there was no acceptance by him. An acceptance to be valid, must be in writing, (1 R. S., 768, § 6,) and although it is not required to be in any particular form, it must be signed by the acceptor, and it must appear from the written undertaking, that the drawee intended to take upon himself the obligations and assume the liabilities of an acceptor, or at least that by the writing, the holder was induced to believe that the drawee did undertake, as an acceptor, so as to estop him from denying his acceptance thereafter. The signature of the acceptor may be either in the usual form, or may be in characters or cyphers, but it must appear from the writing, when fully understood, that the person sought to be charged as an acceptor, designed by the writing to accept the bill according to its terms. *Brown* vs. *The Butchers' and Drovers' Bank*, 6 Hill, 443; *Palmer* vs. *Stephens*, 1 Den., 471. It is competent in an action between the original parties to a written instrument, for one whose initials or full name appears to the obligation to show that they were placed there to attest the execution of the instrument, or for any other lawful purpose, and not as maker of the instrument. *Palmer* vs. *Stephens*, *Ib.* If the purpose for which a party puts his name upon a paper appears by the form of the instrument or in any other way, upon the face of the writing, there is no necessity of parol evidence to establish the same fact, and if the apparent purpose is to attest the execution by a third person or

some other legitimate purpose, and not as maker, the burthen of proof will be upon the holder of the writing, (if such proof should be competent,) to show that the name was put there with intent to create an obligation as a party.

The question in this case would have been different, had Hamilton merely written his name across the bill, adding thereto the word "Treasurer," or "Treasurer of the Clayville Mills." It might then have been said that the addition was a description of the person, a mere memorandum not affecting his liability to the holder of the bill. At least it might well be said to be equivocal, and therefore to be taken most strongly against the party thus signing his name. Although by such signature to a promissory note given for the benefit of the corporation, it might be bound as maker, it is more questionable whether an acceptance in that form would not be the acceptance of the drawee individually, and not of the corporation.

But here the act of the drawee is by no means equivocal. He has declared as plainly as he could do, that he did not intend to accept the bill individually, and become bound as acceptor. It is true his name is signed to the acceptance, but simply as the agent of the Clayville Mills, and to attest the execution by that company, to show that he, as the amanuensis of the company, wrote the corporate name to the acceptance. Had the acceptance been under the corporate seal of the company, and the drawee's name had not appeared upon the paper, he could not have been charged as acceptor, although he might have affixed the seal. The act relied upon as an acceptance, is upon its face the act of the company, and not of the drawee. There is nothing by which the holder had a right to infer that the drawee intended to bind himself as acceptor of the bill. It is not enough that the drawee should write the word "accepted," across the bill; it must be signed by him. This is not so signed; it is signed by the Clayville Mills. The acceptance is no more signed by the drawee, than it would have been had some third person signed as acceptor, and Hamilton had at the request of the holder, written his name on the margin or underneath, expressing in words that he did so to attest the signature of

such third person, and for no other purpose. By writing his own name, he has merely certified that he signed the name of the "Clayville Mills" by the procurement of that company. It is as if he had said after signing the name of the corporation to the obligation, "I certify that I signed the name of the 'Clayville Mills' to this acceptance, as the Treasurer and agent of that company, and that I have full authority to do so, and by such act to bind the company." This is quite different from saying "I accept this bill," and signing it individually. The language in each case is equally plain. In the one, it is an acceptance by the drawee, and in the other, it is not. The bill was not accepted by the drawee, and if the acceptance is not that of the "Clayville Mills," it was accepted by no one, and the defendant is discharged for want of notice of non-acceptance by the drawee.

A question was made upon the liability of the Clayville Mills upon the acceptance. In the view I take of the case it is quite immaterial whether that company is bound or not. If the drawee did not accept the bill when it was presented for acceptance, the defendant, as endorser, was entitled to notice of the non-acceptance; and such notice not having been given, he is discharged. But it is said that Hamilton, having undertaken to act for and bind the corporation of which he was treasurer; if he has failed to do so, he may be charged as acceptor in the place of the party for whom he professed to act. I think this proposition cannot be sustained, but for all the purposes of this case it may be assumed to be true, without at all affecting the result.

It is quite material whether Hamilton's liability is as acceptor, or by reason of his undertaking to accept for another and failing to bind that other for want of authority or for any other reason. The undertaking of the defendant was that the drawee should accept the bill when presented, and not that he would commit no fraud upon the holder. If he refused to accept, the endorser was entitled to notice. An ineffectual attempt to bind another person, which should subject the drawee to a liability, would not be equivalent to an acceptance in form by him. The agent, in acting for his principal, undertakes, for the truth of his representations as to his authority,

and while in this State he may in some cases be made liable as upon a contract made by himself, still the fraud and misrepresentation is the gist and foundation of the action. In England and Massachusetts, and some other States, the action against the agent must be by special action on the case. 3 Barn. & Ald. 114; 11 Mass. 97; 16 ibid. 461; 11 S. & R. 129; 3 Johns. Cas. 70; 13 Johns. Rep. 307; 7 Wend. 315; ibid. 106; 2 Greenl. R. 358.

The ground of recovery against the professed agent in a case like this would be that he had not given the holder the valid acceptance of a third person, which he had undertaken to do. His liability would not be that of drawee and acceptor, but would be that which, as agent of the Clayville Mills, he undertook to assume on behalf of that corporation; that is, as an acceptor for honor, or a collateral acceptor. Suppose that when the bill was presented Hamilton, instead of accepting the bill, had delivered to the holder the promissory note of a third person, guaranteeing its payment. He would, by this absolute guaranty, have become bound for the payment of the amount specified in the bill, but not as acceptor, or in a way to excuse notice of non-acceptance of the bill to drawer and endorsers. The note and its guarantee would have been collateral to the bill. In this case, the defendant never undertook that the Clayville Mills should accept or that Hamilton had authority to act for them in the premises.

Again, the liability of Hamilton upon this branch of the case is sought to be established not by want of authority to act as agent for the Clayville Mills, and to bind them in a legitimate form for the payment of the sum named in the bill, but for the reason that the form of the undertaking is such that the company could not be bound by it under the circumstances; in other words, that no one can become liable as acceptor, except the drawee, or one who accepts *supra protest* for the honor of the drawer or some other party, and that the Clayville Mills were neither drawers or acceptors for honor. It is sufficient to say in answer to this, that the circumstances of the case and the form of the undertaking were known to the holder of the bill, and that he received the acceptance, such as it was, with full knowledge of all

the facts which could affect the liability of the nominal acceptor, and as there was no fraud on the part of Hamilton, so no liability was recovered by him. An agent is only bound for the truth of his representation as to his agency. If he has authority to do what he professes to do, he is absolved from liability. The parties agreed upon the form of the undertaking of the Clayville Mills, and if it is ineffectual to bind them, there is no reason why the loss should fall on Hamilton. The cases cited and relied upon by the counsel for the plaintiffs are cases of want of authority, in fact, to act for the principal, or in which the agent had, by the form of his execution of the power, bound himself, as in *White* v. *Skinner*, 13 John. Rep. 315; *Meech* v. *Smith*, 7 W. R. 315; *Dusenbury* v. *Ellis*, 3 J. Cases, 70; 1 Denio, 471, and need not be examined in detail. So, whether the acceptance by the Clayville Mills was an acceptance for honor, binding them, is not material. If it was, then, it not being the acceptance of the drawee, the defendant is discharged, and if it was not, the defendant is nevertheless discharged, if I am right in my conclusions, that it was not the acceptance of the drawee. It would not follow that it was the acceptance of the drawee because it was not that of the corporation of which he was the agent. Perhaps the acceptance may be a valid acceptance for honor, and obligatory upon the acceptors as such, and I am inclined to think it is so for the following reasons. An acceptance *supra protest* may be made for the honor of the drawer or endorser or drawee of the bill, upon payment by the acceptor for honor, he has recourse to the party for whose honor it is accepted, and all prior parties. Story on Bills, § 221 and Seq. A general acceptance *supra protest* will be held to be for the honor of the drawer. Ch. on Bills, ch. 8, § 3; p. 377, ed. of 1833. It cannot be accepted for honor until after dishonor by the drawee, and, in the language of the books a protest for non-acceptance is necessary and should precede the collateral acceptance or payment. 3 Kent's Com. 87. A protest is strictly applicable to foreign bills only, and has no proper application to inland bills of exchange. Story on Bills, § 281, note 3. But a demand of acceptance, or payment of an inland bill, with notice of dishonor to the proper parties, an-

swers the purpose of a protest of a foreign bill, and this should precede an acceptance or payment for honor to the end that the acceptor for honor may have his recourse even against the parties liable to him. The holder of the bill undertakes to the acceptor for honor that he has done everything necessary to charge the parties to the bill, who should, in case of payment, be liable even to him. Without examining this question at length, I think this is the result of the authorities, and this the object of the protest. *Scofield* v. *Bayard*, 3 W. R. 488; *Williams* v. *Germaine*, 7 Barn. & Cress. 468; *Hoan* v. *Caymon*, 16 East, 391, and the case from Lutw. edited by Lord Ellenburgh; Chitty on Bills, ch. 8, § 3; *Barry* v. *Clark*, 19 Pick. 220. There is no evidence that notice of non-acceptance was given to the drawer and endorsers upon the acceptance by the Clayville Mills. On the contrary, it is conceded that such notice was not given to the endorsers. It is, however, proved that the drawer had no funds in the hands of the drawee, so that notice was not necessary to charge the drawer. *Com. Bank of Albany* v. *Hughes*, 17 W. R. 94; *Dollful* v. *Frosch*, 1 Den. 367. The bill was drawn by the Clayville Mills, who became also the acceptors. They knew they had no funds in the hands of the drawee, and were primarily liable for its payment; and upon payment by them they could have no recourse to the endorsers. They therefore lost nothing for want of notice of non-acceptance to the endorsers. *Gowan* v. *Jackson*, 20 Johns. 176. They accepted for their own honor, and as drawers and acceptors had notice of the non-acceptance by the drawee, I see not why, upon principle, it is not a good acceptance. Again, it may be that if the Clayville Mills are not liable as technical acceptors for honor; they are liable as upon an absolute undertaking by their acceptance to pay the bill. They are the drawers of the bill without funds in the hands of the drawee, and after its dishonor had presumed absolutely to pay it according to its terms. They may well be bound by such an acceptance, when a stranger would not be bound. But waiving the further consideration of all other questions, the defendant is, I think, entitled to judgment by reason of the refusal of the drawee

to accept and the omission of the holder to give notice of non-acceptance to the defendant.

Judgment accordingly.

Affirmed on appeal by the court in *banc*.

ALLEN, HUBBARD and PRATT, JJ.

Supreme Court of Pennsylvania, May, 1852.

SCHRIVER ET AL. *vs.* MEYER.

A testator, by his will, proved in 1829, devised as follows: "*Principally and first* of all, I commend my soul into the hands of Almighty God who gave it, and my body to the earth, to be buried in a decent and Christian like manner, at the discretion of my executors hereinafter named, and as to such worldly estate wherewith it has pleased God to bless me in this life, I give and dispose of the same in the following manner, to wit: *Item*, it is my will, and I order and direct that all my just debts and funeral expenses shall be first paid and satisfied. *Item*, it is my will, and I give, devise and bequeath unto my beloved wife, Elizabeth, eighty-five acres, and allowance of land of my dwelling plantation, whereon I now live, situate in Springgarden township, in the county aforesaid, she to have the choice of the same wherever she thinks proper; and further, I do give and bequeath unto my said wife, all my moveable property or personal estate, of what kind or nature the same may be, together with all the monies due me, by bond, note or book account, to and for her only proper use and behoof whatever. *Item*, it is further my will, that my brother and sisters divide the residue of my said plantation amongst themselves, share and share alike.

Held, that the introductory words might be brought down to interpret the subsequent devise to the wife, and that they enlarged it into a fee. Weidman *vs.* Maish, 4 Harris, 504, overruled. GIBSON, J., *dissenting*. BLACK, C. J., *also dissented*.

Error to the Common Pleas of York County.

John Meyer, of York County, Pennsylvania, on the 2d of September, 1827, made his will in the following words:

In the name of God, amen, I John Meyer, of Springgarden township, in the County of York and State of Pennsylvania, farmer,